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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID S. KARTON, A LAW CORPORATION, Plaintiff and Respondent, v. WILLIAM RUSSELL DOUGHERTY, Defendant and Appellant.	B201663 (Los Angeles County Super. Ct. No. BC206243) ORDER MODIFYING OPINION AND DENYING REHEARING (Helen I. Bendix, Judge [NO CHANGE IN JUDGMENT]

THE COURT:

IT IS ORDERED that the opinion filed herein on February 17, 2009, be modified in the following particulars:

1. On page 9, delete the last sentence of footnote 4, beginning with "As a result" and ending with "seized them" and in its place the following:

As a result of a stipulated order in the bankruptcy proceeding, Karton applied the $56,000 to his administrative claim for attorney's fees in that

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part III under Discussion.

proceeding, rather than applying those funds to the default judgment pursuant to which he had originally seized them.

2. On page 10, the entire last paragraph beginning with "As a result" and ending on page 11 with "the default judgment" is deleted and the following paragraph is inserted in its place:

> As a result of the Tennessee enforcement proceedings, Karton garnished approximately 25 percent of Dougherty's wages in Tennessee. (The record reflects that the garnishment remained in effect as of May 2007, and the record contains no evidence as to whether the garnishment terminated thereafter.) Karton has also filed a separate lawsuit in Tennessee against Dougherty and his wife, alleging claims for violation of Tennessee's fraudulent transfer statute, common law fraud, abuse of process, malicious prosecution, and civil conspiracy. Karton's complaint alleges that Dougherty fraudulently transferred certain assets to his wife, "which transfers were done in order to avoid satisfaction of" the default judgment. The complaint specifically identifies the home that Dougherty and his wife have purchased in Tennessee, and the complaint asks the court to "set[] aside all fraudulent transfers made by Dougherty and order[] Dougherty to turn over to Karton all assets so transferred in order to satisfy" the default judgment.

3. On page 12, the entire text of footnote 5 is deleted, and replaced with the following:

> The evidence Karton submitted in support of the application appears to continue Karton's previous practice of calculating interest on the basis of a 360-day year.

4. On page 14, first line at the top after the citation ending with "subd. (a)" and before the period, add the following:

; see also § 685.080, subd. (b) ["The notice of motion shall be served on the judgment debtor"]

5. On page 14, first sentence of footnote 10, delete the "*v.*" between "*etc.* and *Bk.*" of the citation.

6. On page 15, the entire last paragraph beginning with "We conclude" and ending on page 16 with "virtually inevitable" is deleted and replaced with the following paragraph:

> We conclude nonetheless that section 685.070 must be interpreted as requiring service of the memorandum of costs on all judgment debtors, including default judgment debtors, for the following reason: Section 685.070 provides that if the judgment creditor files a memorandum of costs and the judgment debtor does not timely file a motion to tax costs, then the court is required to allow all of the costs claimed in the memorandum of costs. (§ 685.070, subd. (d) ["If no motion to tax costs is made within the time provided in subdivision (c), the costs claimed in the memorandum are allowed"]; see Ahart, California Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2008) ¶ 6:51, pp. 6A-21 to 6A-22 ["If a timely motion to tax is not filed by the judgment debtor, enforcement costs claimed in the judgment creditor's Memorandum are automatically allowed and added to the judgment"].) Consequently, if Karton were right that a default judgment debtor is not entitled to notice of a memorandum of costs under section 685.070, then the statute would compel trial courts to grant all of the costs requested in such memoranda, because judgment debtors who are unaware of the proceedings will never have the opportunity to file motions to tax. In effect, every default judgment would become a blank check in favor of the judgment creditor. We cannot believe that the Legislature intended to create such a rule, which would make error and mischief virtually inevitable.

7. On page 16, first sentence in the third full paragraph, insert "Under" before "Karton's" and insert "the statutes," between "of" and "sections" adding a footnote at the end of the sentence, so that the sentence now reads as follows:

> Under Karton's interpretation of the statutes, sections 1010 and 685.070 would prohibit trial courts from rooting out such errors, requiring them instead to rubber-stamp the memoranda of costs[12] filed by default judgment creditors in one uncontested proceeding after another.[13]

Add as footnote 13 the following text. Adding the footnote will require renumbering of all subsequent footnotes:

> [13] Subdivision (d) of section 685.070 might violate constitutional principles of separation of powers, because its categorical command that "all claimed costs are allowed" might impermissibly "defeat or materially impair" the courts' "inherent power to resolve specific controversies between parties." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1103.) Even if that subdivision were unconstitutional, however, our analysis of the notice issue would be unaltered.

8. On page 18, replace the first sentence under Part II, as follows:

Dougherty argues that the 1999 default judgment is void on the face of the record and therefore "should be vacated," because it awards relief that exceeds what was demanded in Karton's operated first amended complaint.

9. On page 24, delete the second sentence of the first full paragraph, beginning with "Karton has" and ending with "Dougherty's wages" and replace it with the following:

> Karton has obtained the rights to the value of Dougherty's Pennsylvania home and is attempting to repeat the process in Tennessee, where Karton has garnished 25 percent of Dougherty's wages.

10. On page 25, after the last full paragraph and before "DISPOSITION" on page 26, add the following paragraphs:

In his petition for rehearing, Karton argues that we failed to address his argument that because of the judgment in the 2005 action, claim preclusion, and not merely collateral estoppel (i.e., issue preclusion), bars Dougherty's challenges to the 2007 fee award and the 1999 default judgment. We did not overlook the issue. Rather, we concluded that insofar as the issue was raised at all in Karton's respondent's brief, it was so unsupported by argument and so lacking in prima facie merit as to warrant no discussion.

The res judicata section of Karton's respondent's brief begins with subsections describing the 2003 fee award, the 2005 action, and the results of the sister state enforcement proceedings, followed by a subsection entitled "Preclusive Doctrines Apply." In the latter subsection, Karton gives extremely abbreviated general descriptions of issue preclusion and claim preclusion, but he never explains precisely which doctrine (issue preclusion or claim preclusion) applies to which prior orders or judgments (the 2003 fee award, the judgment in the 2005 action, or the sister state court decisions) concerning which issues (the lack of notice of the 2003 fee application, the lack of notice of the 2007 fee application, or any of the several alleged jurisdictional defects in the 1999 default judgment).

In support of the assertion that "[p]reclusive [d]octrines [a]pply," Karton's respondent's brief specifically discusses only one issue, namely, his contention that Dougherty is not entitled to notice of applications for awards of postjudgment enforcement costs. But the judgment in the 2005 action cannot possibly bar Dougherty's challenges to the 2007 fee award *as a matter of claim preclusion*, because the judgment in the 2005 action was entered before Karton filed the 2007 fee application. (See 7 Witkin, Cal. Procedure, *supra*, Judgment, § 404, p. 1038 [claim preclusion does not

apply "[i]f the second action is on a different cause of action, as where there are successive breaches of an obligation"].) Moreover, neither in his respondent's brief nor in his petition for rehearing does Karton cite any authority for the proposition that claim preclusion ever operates to limit the issues that can be raised in a motion under section 473. We are aware of none.

For all of these reasons, we concluded (and, after Karton's petition for rehearing, still conclude) that claim preclusion does not prohibit us from deciding the merits of any of the issues addressed in this opinion.

This modification does not have an effect on the judgment.

Respondent's petition for rehearing is denied.

MALLANO, P. J. ROTHSCHILD, J. WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.